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KETUA PENGARAH HASIL DALAM NEGERI v. ALCATEL-LUCENT MALAYSIA SDN BHD & ANOR

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
SURIYADI HALIM OMAR FCJ
B
ZAINUN ALI FCJ
RAMLY ALI FCJ
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: 01(f)-18-08-2012(W)]
29 NOVEMBER 2016

C

REVENUE LAW: *Income tax – Withholding tax – Assessment of – Assessment based on both ss. 109 and 109B of Income Tax Act 1967 – Whether assessment void for want of form – Whether income derived from royalty payments – Whether Director General of Income Tax ('DGIR') acted in excess of powers conferred by ITA*
D *– Whether decision-making process by DGIR flawed – Whether there was withholding of tax*

REVENUE LAW: *Income tax – Withholding tax – Notice of assessment by Director General of Income Tax ('DGIR') – Whether subject to appeal to Special Commissioners of Income Tax – Failure to appeal despite being aggrieved by*
E *decision of DGIR – Whether amounted to failure to rebut deeming provisions – Whether DGIR statutorily bound to withhold payment as tax – Income Tax Act 1967, ss. 4(d), 4A, 109 & 109B*

The first respondent, a Malaysian company, and the second respondent, a
F non-resident, entered into a service agreement whereupon the second respondent was to provide services to the first respondent from overseas. The appellant, in the course of conducting a withholding tax audit over the first respondent's business, discovered that no withholding tax was paid by the first respondent to the appellant in respect of payments made to the second respondent. Consequently, the appellant issued a letter dated 31 October
G 2007 informing the first respondent of its omission to pay the withholding tax for the years of assessment 2001-2005 totalling RM4,489,747 and demanded payment. The appellant held the view that the payments made by the first respondent to the second respondent, in consideration of the services rendered by the latter, were royalty payments and therefore subject to
H withholding tax. The appellant also stated that if no payments were made, it would disallow any deduction under s. 39(1)(f) and (j) of the Income Tax Act 1967 ('ITA'). However, after negotiations, the amount required to be paid by the first respondent was finally reduced to RM1,507,674.80, which was confirmed in a letter dated 14 April 2008 to the respondents' tax agent.
I In the said letter, the appellant referred to ss. 109 and 109B of the ITA. Subsequently, *vide* a letter dated 28 April 2008, the first respondent registered its dissatisfaction to the appellant and alleged that the appellant did not supply the reasons as to why the payments were subject to withholding

tax. Despite that, the first respondent paid the negotiated sum under protest on 28 April 2008 but continued to hold the view that the services were not royalty as they were performed outside Malaysia. However, the respondents never filed any appeal to the Special Commissioners of Income Tax ('SCIT') pursuant to the ITA. Instead, the respondents filed a judicial review application under O. 53 of the Rules of the High Court 1980 ('RHC'), *inter alia*, for an order of *certiorari* to quash the appellant's decision made in the letter dated 14 April 2008, a declaration that the appellant's decision was erroneous in law and also prayed for the refund of the withholding tax already paid. The High Court allowed the application for judicial review and the decision was affirmed by the Court of Appeal. Hence, the appellant obtained leave of the court to determine two questions, namely, (i) whether the letter dated 14 April 2008 referring to both ss. 109 and 109B of the ITA was bad in law; and (ii) if the answer to question (i) is in the negative, were the payments for the services as referred in the agreement were royalties under s. 109 of the ITA. The respondents submitted that the appellant was unreasonable in applying both ss. 109 and 109B to the payments in that the appellant was unsure which section applied to the payments made by the first respondent to the second respondent. The respondents further submitted that the appellant had exacerbated by failing to give reasons for the impugned decision.

Held (allowing appeal with costs)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) The contested income to be taxed was alleged to have been derived from royalties, as legislated in s. 4(d) of the ITA. Under s. 4A(i), (ii) or (iii) of the ITA, the income of a person not resident in Malaysia but derived from Malaysia is chargeable to tax. The duty to withhold tax on royalty income would invariably fall under s. 109 whilst the special class of income that falls under s. 4A will be catered to by the withholding provision of s. 109B. Both ss. 109 and 109B are withholding provisions and, as the respondents had been informed that the income came from royalty payment, the respondents' tax agent could not have been misled by something so obvious. (paras 46, 48 & 52)

(2) An appeal before the SCIT under s. 99 of the ITA would have given the respondents an opportunity to challenge the decision of the appellant as to whether the payments were indeed royalty. The respondents would also have had the chance to rebut s. 15A of the ITA, which provides that certain income, including the likes of services rendered by the second respondent to the first respondent, shall be deemed to be derived from Malaysia. However, despite being aware and aggrieved of the impugned decision, the respondents did not file any appeal to the SCIT against the determination by the appellant. (paras 56 & 62)

(3) By circumventing the SCIT from resolving the issues, and unwittingly leaving the deeming provisions unrebutted, the first respondent's payments to the second respondent were thus income derived from Malaysia. Hence, the requirements of s. 4(d) read together with s. 109 and, s. 4A read together with s. 109B of the ITA had been satisfied. As the first respondent was liable to pay (and did pay), and the second respondent was taxable even though a non-resident, s. 109 and s. 109B, respectively, would be triggered and the first respondent was statutorily bound to withhold a portion of the payments as tax. (para 63)

(4) It is established law that papers or notices of assessments sent out by the appellants to taxpayers are not assessments. An assessment is the official administrative act of the appellant who determines the amount of tax to be paid by a taxpayer, after taking into account all the relevant circumstances. Notices of assessments will be sent out only after the ascertainment is complete. On the facts, the appellant did make an assessment and with the imposition of the withholding tax being an assessment, it was subject to appeal to the SCIT under s. 99. (paras 79 & 81)

(5) The grounds relied on by the respondents in their application for judicial review were founded on error of law or acting in excess of powers conferred by the ITA and/or without jurisdiction, which fell squarely on the term of 'illegality'. However, there was no flaw detectable in the decision-making process and no illegality or irrationality in the decision. In the circumstances, the appellant's decision must stand and hence, the respondents were liable to the withholding tax. (paras 76, 91 & 95)

(6) Under O. 53 r. 3(6) of the RHC, an application shall be made promptly or within 40 days when grounds for the application first arose, or when the decision was first communicated. On evidence, the respondents were way out of time and no application to extend time was ever filed. The judicial review application being flawed and out of time was thus incompetent. Therefore, the first question was answered in the negative and the court refrained from answering the second question. (paras 97 & 102)

Per Zainun Ali FCJ (supporting):

(1) The law does not impose a general duty upon decision-makers to give reasoned decisions. Among the determining factors when reasons ought to be given by administrative decision makers lie in the nature and character of the decision making and when the giving of reasons will be required as a matter of fairness and openness. (para 113)

(2) The appellant was found to be uncertain and unclear in its decision-making when it listed down ss. 109 and 109B without more, in the said letter. Both sections are withholding tax provisions under the ITA. However, an erroneous statement of the law as such, would not bar the

appellant from claiming the withholding tax. Applying s. 143(1) of the ITA, even if the appellant was uncertain as to the exact applicable provision, it did not render the assessment void for want of form. Hence, the allegation of procedural impropriety ought not to be permitted to vitiate the appellant's statutory duty to assess and collect the correct amount of tax. Hence, the first question was answered in the negative. The appellant's letter dated 14 April 2008 referring to ss. 109 and 109B of the ITA was good and not bad in law. (paras 124, 126 & 128)

(3) If it was dissatisfied with the assessment or notice of assessment issued by the appellant, the first respondent ought to have exercised its right to appeal under s. 99 of the ITA, to make known of its dissatisfaction to the SCIT. Since the respondents failed to file an appeal to the SCIT, the court should not delve into the merits of the matter which ought to be resolved by the SCIT. Therefore, the court need not answer the second question. (paras 127 & 129)

Bahasa Malaysia *Headnotes*

Responden pertama, sebuah syarikat Malaysia, dan responden kedua, bukan pemastautin, memasuki satu perjanjian perkhidmatan yang mengkehendaki responden kedua memberi perkhidmatan kepada responden pertama dari luar negara. Perayu, semasa menjalankan audit cukai penangguhan terhadap perniagaan responden pertama, mendapati cukai penangguhan tidak dibayar oleh responden pertama kepada perayu berkaitan bayaran-bayaran yang dibuat kepada responden kedua. Akibatnya, perayu mengeluarkan satu surat bertarikh 31 Oktober 2007 memaklumkan kepada responden pertama tentang ketinggalannya membayar cukai penangguhan bagi tahun-tahun taksiran 2001-2005 berjumlah RM4,489,747 dan menuntut bayaran. Perayu berpendapat bayaran-bayaran yang dibuat oleh responden pertama kepada responden kedua, sebagai balasan bagi perkhidmatan yang diberi oleh responden kedua, sebagai bayaran royalti dan oleh itu tertakluk kepada cukai penangguhan. Perayu juga menyatakan bahawa jika bayaran tidak dibuat, apa-apa penolakan di bawah s. 39(1)(f) dan (j) Akta Cukai Pendapatan 1967 ('Akta') tidak akan dibenarkan. Walau bagaimanapun, selepas beberapa rundingan, jumlah yang perlu dibayar oleh responden pertama akhirnya dikurangkan kepada RM1,507,674.80, yang disahkan dalam surat bertarikh 14 April 2008 kepada ejen pencukaian responden-responden. Dalam surat tersebut perayu merujuk ss. 109 dan 109B Akta. Kemudian, melalui surat bertarikh 28 April 2008, responden pertama mendaftarkan ketidakpuasan hatinya kepada perayu dan mendakwa bahawa perayu tidak memberi alasan mengapa bayaran-bayaran tersebut tertakluk pada cukai penangguhan. Walau bagaimanapun, responden pertama membayar jumlah yang dirundingkan dengan bantahan tetapi meneruskan dengan pendapatnya bahawa perkhidmatan tersebut bukan royalti kerana dilaksanakan di luar Malaysia. Namun begitu, responden-responden tidak memfailkan apa-apa rayuan kepada Pesuruhjaya Khas Cukai Pendapatan ('SCIT') menurut Akta.

Sebaliknya, responden-responden memfailkan permohonan semakan kehakiman di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980, antara lain, untuk perintah *certiorari* membatalkan keputusan perayu yang dibuat melalui surat bertarikh 14 April 2008, satu deklarasi bahawa keputusan perayu terkhilaf dari segi undang-undang dan memohon pemulangan cukai penangguhan yang telah dibayar. Mahkamah Tinggi membenarkan permohonan semakan kehakiman dan keputusan tersebut disahkan oleh Mahkamah Rayuan. Dengan itu, perayu memperoleh kebenaran mahkamah untuk pemutusan dua persoalan, iaitu (i) sama ada surat bertarikh 14 April 2008 yang merujuk kedua-dua ss. 109 dan 109B Akta adalah salah dari segi undang-undang; dan (ii) jika soalan (i) dijawab secara negatif, sama ada bayaran-bayaran bagi perkhidmatan seperti yang dirujuk dalam perjanjian adalah royalti di bawah s. 109 Akta. Responden-responden menghujahkan bahawa perayu tidak munasabah dalam mengguna pakai kedua-dua ss. 109 dan 109B bagi bayaran-bayaran tersebut; perayu tidak pasti seksyen mana yang terpakai pada bayaran-bayaran yang dibuat oleh responden pertama kepada responden kedua. Responden-responden selanjutnya menghujahkan bahawa perayu memburukkan lagi keadaan kerana gagal mengemukakan alasan bagi keputusan yang dipersoalkan.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Pendapatan yang dipertikaikan untuk dicukai didakwa diperoleh daripada royalti-royalti, seperti yang digubal dalam s. 4(d) Akta. Di bawah s. 4A(i), (ii) atau (iii) Akta, pendapatan seseorang yang bukan pemastautin di Malaysia adalah boleh dicukai. Kewajipan menangguhkan cukai atas pendapatan royalti terangkum di bawah s. 109 sementara pendapatan kelas khas yang terangkum di bawah s. 4A tertakluk pada peruntukan penangguhan di bawah s. 109B. Kedua-dua ss. 109 dan 109B adalah peruntukan penangguhan dan, oleh sebab responden-responden sedia maklum bahawa pendapatan tersebut datang daripada bayaran royalti, ejen pencukaian responden-responden tidak mungkin tersalah arah oleh sesuatu yang amat jelas.

(2) Rayuan di hadapan SCIT di bawah s. 99 Akta akan memberikan responden-responden peluang untuk mencabar keputusan perayu sama ada bayaran-bayaran tersebut sememangnya royalti. Responden-responden juga berpeluang menyangkal s. 15A Akta, yang memperuntukkan bahawa pendapatan tertentu, termasuk perkhidmatan responden kedua kepada responden pertama, dianggap diperoleh dari Malaysia. Walau bagaimanapun, walaupun menyedari dan terkilan dengan keputusan yang dipersoalkan, responden-responden tidak memfailkan apa-apa rayuan kepada SCIT terhadap keputusan perayu.

(3) Dengan memintasi SCIT daripada menyelesaikan isu-isu tersebut, dan tanpa sengaja membiarkan peruntukan-peruntukan anggapan tidak dibatalkan, bayaran-bayaran responden pertama kepada responden kedua, oleh itu, adalah pendapatan yang diperoleh dari Malaysia. Dengan itu, keperluan s. 4(d) dibaca bersama-sama dengan s. 109 dan s. 4A dibaca bersama-sama dengan s. 109B Akta dipenuhi. Oleh sebab responden pertama bertanggungan membayar (dan telah membayar) dan responden kedua boleh dicukai walaupun bukan pemastautin, s. 109 dan s. 109B masing-masing tercetus dan responden pertama terikat secara statutori untuk menangguhkan sebahagian bayaran sebagai cukai.

(4) Adalah undang-undang matan bahawa surat-surat atau notis-notis taksiran yang dihantar oleh perayu kepada pembayar cukai bukan taksiran. Satu-satu taksiran adalah tindakan pentadbiran rasmi oleh perayu yang menentukan jumlah cukai yang perlu dibayar oleh pembayar cukai, selepas mengambil kira kesemua hal keadaan relevan. Notis-notis taksiran akan dikeluarkan hanya selepas pemastian selesai. Berdasarkan fakta, perayu telah membuat taksiran dan dengan pengenaan cukai penangguhan sebagai taksiran, ini tertakluk pada rayuan kepada SCIT di bawah s. 99.

(5) Alasan-alasan yang disandarkan oleh responden-responden dalam permohonan semakan kehakiman mereka adalah berasaskan kekhilafan undang-undang atau tindakan melampaui kuasa yang diperuntukkan oleh Akta dan/atau tanpa bidang kuasa, yang terangkum secara tepat dalam terma 'ketaksahan'. Walau bagaimanapun, tiada kesilapan dalam proses membuat keputusan dan tiada kecacatan atau ketidakmunasabahan dalam keputusan tersebut. Dalam keadaan tersebut, keputusan perayu mesti kekal dan oleh itu, responden-responden bertanggungan ditangguhkan cukai.

(6) Di bawah A. 53 k. 3(6) Kaedah-Kaedah Mahkamah Tinggi 1980, satu permohonan mesti dibuat segera atau dalam tempoh 40 hari apabila alasan-alasan bagi permohonan mula-mula timbul, atau apabila keputusan tersebut mula-mula dimaklumkan. Berdasarkan keterangan, responden-responden jauh di luar masa dan tiada permohonan lanjutan masa pernah difailkan. Permohonan semakan kehakiman, yang cacat dan di luar masa, tidak kompeten. Dengan itu, soalan pertama dijawab secara negatif dan mahkamah enggan menjawab soalan kedua.

Oleh Zainun Ali HMP (menyokong):

(1) Undang-undang tidak mengenakan kewajipan am terhadap pembuat keputusan untuk memberi keputusan beralasan. Antara faktor-faktor penentu apabila alasan-alasan wajar diberikan oleh pembuat keputusan pentadbiran terletak dalam sifat dan ciri pembuatan keputusan tersebut dan apabila pemberian alasan akan diperlukan sebagai perkara keadilan dan keterbukaan.

(2) Perayu tidak pasti dan tidak jelas dalam membuat keputusannya apabila menyenaraikan ss. 109 dan 109B tanpa penjelasan dalam surat tersebut. Kedua-dua seksyen adalah peruntukan penangguhan cukai di bawah Akta. Walau bagaimanapun, pernyataan undang-undang yang khilaf sahaja tidak menghalang perayu daripada menuntut cukai penangguhan. Mengguna pakai s. 143(1) Akta, walaupun perayu tidak jelas tentang peruntukan tepat yang terpakai, tidak menjadikan taksiran tersebut batal. Oleh itu, dakwaan ketidakpatuhan prosedur tidak wajar dibenarkan untuk membatalkan kewajipan statutori perayu menilai dan mengutip jumlah cukai yang betul. Dengan itu, soalan pertama dijawab secara negatif. Surat perayu bertarikh 14 April 2008 merujuk kepada ss. 109 dan 109B Akta adalah sah dan tidak bertentangan dengan undang-undang.

(3) Jika tidak berpuas hati dengan taksiran atau notis taksiran yang dikeluarkan perayu, responden pertama sepatutnya melaksanakan hak merayunya di bawah s. 99 Akta, untuk memaklumkan tentang ketidakpuasan hatinya kepada SCIT. Oleh sebab responden-responden gagal memfailkan rayuan kepada SCIT, mahkamah tidak wajar menyentuh merit perkara tersebut yang sepatutnya diselesaikan oleh SCIT. Oleh demikian, mahkamah tidak perlu menjawab soalan kedua.

Case(s) referred to:

ABC v. The Comptroller of Income Tax, Singapore [1959] 1 LNS 1 HC ***(refd)***

Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1155 ***(refd)***

Director-General of Inland Revenue v. Lahad Datu Timber Sdn Bhd [1977] 1 LNS 26 FC ***(refd)***

General Electric Co Ltd v. Price Commission [1975] ICR 1 ***(refd)***

Government of Malaysia v. P Corporation (M) Sdn Bhd (1950-1985) MSTC 426 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd (Civil Application No 8-31-99 (S) (Unreported)) ***(refd)***

Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v. Kumar Gurusamy [2011] 3 CLJ 241 FC ***(refd)***

Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd [2014] 3 CLJ 421 FC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor [1981] CLJ 83; [1981] CLJ (Rep) 74 FC ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Reckitt & Colman (New Zealand) Ltd v. Taxation Board of Review [1996] NZLR 1032 ***(refd)***

Stefan v. General Medical Council [1999] 1 WLR 1293 ***(refd)***

Sun Man Tobacco Co Ltd v. Government of Malaysia [1973] 1 LNS 144 FC ***(refd)***
The King v. The Deputy Federal Commissioner of Taxation for South Australia; ex parte Hooper [1926] 37 CLR 368 ***(refd)***
Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd [2013] 2 CLJ 910 FC ***(refd)***

Legislation referred to:
Copyright Act 1987, s. 36
Courts of Judicature Act 1964, s. 25, Schedule para. 1
Federal Constitution, arts. 5, 6, 7, 8, 9, 10, 11, 12, 13
Income Tax Act 1967, ss. 2, 3, 4(d), 4A(i), (ii), (iii), 15A, 39(1)(f), (j), 99(1), 106(1), 109, 109B, 140(5), 143(1), (2)(b)
Rules of the High Court 1980, O. 53 r. 3(6)

Other source(s) referred to:
Chin Yoong Kheong, *Malaysian Taxation,* 2nd edn, p 283
Michael Supperstone QC & James Goudie QC, *Judicial Review*, p 72

For the appellant - Hazlina Hussain & Ridzuan Othman; Deputy Revenue Solictor & Revenue Counsel
For the respondents - Goh Ka Im & Foong Pui Chi; M/s Shearn Delamore & Co

[Editor's note: For the Court of Appeal judgment, please see Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2015] 9 CLJ 179 (overruled).]

Reported by S Barathi

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] The respondents filed a judicial review application under O. 53 of the Rules of the High Court 1980 on 23 May 2008, *inter alia* for an order of *certiorari* to quash the appellant's decision allegedly made in a letter of 14 April 2008 addressed to the respondents' tax agent, a declaration that the appellant's decision in that letter was erroneous in law, and also prayed for a refund of the withholding tax already paid.

[2] The application for judicial review was allowed by the High Court and affirmed by the Court of Appeal. The appellant on 9 August 2015 successfully obtained leave from this court to determine two questions.

Facts Of The Case

[3] The first respondent is a Malaysian company whilst the second respondent a non-resident.

[4] A service agreement dated 1 January 2003 ("the service agreement") was executed between the first respondent and the second respondent, whereupon the second respondent was to provide services to the first respondent from overseas relating to the provision of a global network for voice, data, and video communication (the services). The rates to be paid were fixed.

[5] The appellant, in the course of conducting a withholding tax audit over the first respondent's business, discovered that no withholding tax was paid by the first respondent to the appellant in respect of payments made to the second respondent.

[6] Pursuant to that discovery, the appellant issued a letter dated 31 October 2007 informing the first respondent of its omission to pay the withholding tax for the years of assessment 2001-2005 totalling RM4,489,747, and demanded payment. The appellant held the view that the payments made by the first respondent to the second respondent, in consideration of the services rendered by the latter, as royalty payments, and hence subject to withholding tax.

[7] Apart from the demand of that withholding tax, the appellant wrote that if no payments were made, it would disallow any deduction under s. 39(1)(f) and (j) of the Income Tax Act 1967 (ITA), to be followed by a commencement of action under s. 106(1) of the ITA to recover tax from the first respondent. Hereinafter, any provision referred to refers to a provision in the ITA, unless stated otherwise.

[8] After negotiations were carried out, the amount required to be paid by the first respondent was reduced from RM4,489,747 to RM1,781,274, and after further representation to the appellant, the sum was finally reduced to RM1,507,674.80 *vide* a letter dated 28 March 2008, which was addressed to the first respondent.

[9] Another letter by the appellant to the first respondent's tax agent ie, PricewaterhouseCooper House Taxation Services Sdn Bhd dated 14 April 2008 reconfirmed the RM1,507,674.80 sum.

[10] The appellant in the abovementioned letter of 14 April 2008, referred to ss. 109 and 109B. Before us, the appellant submitted that the RM1,507,674.80 was withholding tax for royalty payments made to the second respondent by the first respondent.

[11] The first respondent *vide* letter dated 28 April 2008 then registered its dissatisfaction to the appellant.

[12] Despite a lengthy negotiation, exchanges and correspondences, culminating in the reduction of the withholding tax, it was still alleged that the appellant did not supply the reasons why the payments were subject to withholding tax.

[13] The first respondent eventually paid the negotiated sum under protest on 28 April 2008 but continued holding the view that the services were not royalty as they were performed outside Malaysia.

[14] Despite having paid the withholding tax under protest, the respondents never filed any appeal to the Special Commissioners, as provided for under the ITA. Why the respondents did not file any appeal is of no concern of ours, though highly relevant when answering the second question of the leave question.

[15] To register its dissatisfaction, the first respondent filed the abovementioned judicial review under O. 53 of the Rules of the High Court 1980.

[16] On 15 June 2010, the High Court allowed the respondents' application for judicial review with costs of RM4,000.

[17] Being dissatisfied, the appellant appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court.

[18] On 9 August 2015 the appellant successfully obtained leave from this court on the following questions of law:

(a) whether the letter of the Director General of Inland Revenue dated 14 April 2008 referring to both ss. 109 and/or 109B of the Income Tax Act 1967 is bad in law; and

(b) if the answer is in the negative, are the payments for the services as referred in the agreement exhibited as "PC3" royalties under s. 109 of the Income Tax Act 1967.

The Appellant's Submission

[19] Learned counsel for the appellant submitted that the judicial review application was an application to challenge the decision-making process of the Director General of Inland Revenue, with the decision being the imposition of the withholding tax under the ITA over the payment of Leased Communication Facilities, made by the first respondent to the second respondent. It boils down to whether the appellant's decision in 14 April 2008 letter is invalid.

[20] The appellant added that the High Court had wrongly agreed with the respondents that they became aware that the payments were royalties, and were subject to withholding tax, only through the appellant's affidavit in reply as affirmed on 15 June 2009 (encl. 14).

[21] It was ventilated by the appellant that the High Court was in error in law and in fact for failing to take into account the material facts of the case, as the respondents were aware of the withholding tax after due scrutiny of the available affidavits at the High Court. The only complaint worthy of consideration as raised by the respondents in their affidavits was that no reason was given by the appellant of its treatment that the Leased Equipment Facilities payments were royalty.

[22] Expanding on this argument, the appellant submitted that under the ITA, the Director General of Inland Revenue is statutorily not bound to give reasons for its decision to impose withholding tax. Further, this is not a case under s. 140(5) where the appellant is under a statutory duty to give particulars when raising an additional assessment as a result of adjustments having been made under s. 140.

[23] According to the appellant, the facts show that the appellant's conduct was in compliance with the principles of natural justice. By having several meetings between the representative of the first respondent, the respondents' tax agent, and the assessors involved in the audit, the respondents had been accorded their fundamental rights to be heard.

[24] Learned counsel for the appellant further submitted that based on the correspondences and meetings between the first respondent and the appellant, it could be gleaned that the first respondent and its tax agent were aware of the issues at hand. In other words, they knew about the issue of the non-compliance of the withholding tax provisions under the ITA right from the beginning of the auditing exercise.

[25] The appellant argued that only two withholding tax provisions were involved. The respondents were not in the dark when they received the appellant's letter of 14 April 2008. It was submitted that the reference to both ss. 109 and 109B in the said letter thus was not unreasonable.

[26] The appellant also emphasised that it has always been a presumption that the administration exercises its power in good faith and for public benefit and that there is no flaw in the decision-making process of the appellant. In the premises, it was submitted that question (a) posed before this court ought to be answered in the negative.

[27] It was submitted by the appellant that the respondents were represented by a reputable tax agent who was aware of the issues and the application of the provisions of the ITA. The outcome of the several meetings between both parties was the reduction of the withholding tax. The respondents thus were given fair and reasonable opportunities to put their case before the appellant before the matter was finalised.

[28] In respect of question (b), posed before this court the appellant submitted that the payments made by the first respondent to the second respondent in respect of services were royalty payments within the definition of "royalty" under s. 2.

[29] Evidentially, based on the facts of the case, the appellant submitted that the first respondent and the second respondent are subsidiaries of Alcatel-Lucent, which is incorporated in France, and the ultimate holding company of both the respondents.

[30] Supplying further facts, the appellant submitted that during the years 2001 and 2005 and pursuant to a service agreement, it was agreed by the second respondent that it designs, implements and operates a global network for voice, data and video communication. The service agreement thus is a crucial document that must be analysed to determine whether the payments made for the services from 2000-2006 for the Leased Communication Facilities were in fact and in law royalty.

[31] On the argument regarding the draft agreement which was alleged not to have been implemented, the appellant submitted that the onus is on the respondents to prove that it was never implemented. The payments, on the other hand, made by the first respondent to the second respondent, are the solid proof that the first respondent had in fact benefited from the terms of the draft agreement arising from the leasing of the facilities. That being so, by action and conduct of the respondents, the draft agreement was indeed executed by the respondents.

[32] A perusal of the service agreement shows that the first respondent has to make payments to the second respondent as consideration for the use of the software, with the consideration having been paid by the first respondent to the second respondent for the services rendered from 2000 till 2005, being RM7,869,698.

[33] It was submitted that it could not be an outright sale as the first respondent was only given a non-exclusive, non-transferable right to use the software and the copyright remained with the second respondent. The right to use the software was given to the first respondent, as without such consent granted by the second respondent, the former would have infringed a copyright under s. 36 of the Copyright Act 1987.

[34] These payments therefore, were "royalty" as defined under s. 2 of the ITA, being payment to the second respondent for the use of the intellectual property.

[35] The appellant further submitted that it is immaterial whether the expenses incurred is to gain or produce the income of the payer, as a payment is royalty if it falls within s. 2 and not otherwise, unless clearly provided for.

[36] Based on the above premises, the appellant submitted that this appeal ought to be allowed with costs.

The Respondents' Submission

[37] The respondents submitted that the courts below were correct in law and in fact in holding that the appellant was unreasonable in applying both ss. 109 and 109B for the payments and exacerbated by failing to give reasons for the impugned decision.

[38] Learned counsel for the respondents conceded that even though there are only two withholding tax sections in the ITA, namely s. 109 and s. 109B, and by so listing both sections it showed that the appellant was unsure which section applied to the payments made by the first respondent to the second respondent. In short, the appellant had not come to a determination as to which section applied to the said payments.

[39] The respondents submitted that when asked by the respondents' tax agent, as to which withholding tax provision applied to the said payments, the appellant was unable to provide any answer. Instead, the appellant merely listed down ss. 109 and 109B.

[40] The respondents further canvassed that a perusal of the two sections will show that they cover different types of payments and that they relate to different things; otherwise there would be no necessity for two separate withholding tax provisions in the ITA. It was submitted that if the appellant was uncertain and unclear as to which legal provision should have been alluded to, in order to withhold the tax, it would fundamentally be unreasonable to require taxpayers to withhold the taxable portion.

[41] It was submitted by the respondents that by the appellant so listing both ss. 109 and 109B as the legal provisions for subjecting the payments to withholding tax, the appellant had committed an error of law in numerous ways, including, acting mechanically, omitting to give reasons for the impugned decision, taking into account irrelevant considerations, misconstruing the terms of the ITA and arriving at a decision which is evidently unreasonable.

[42] The respondents also submitted that the failure by the appellant, as a decision-maker, to give reasons for its decision was a violation of the principles of procedural fairness and natural justice. By that failure, the respondents were deprived of the opportunity to explain, or make a case based on the facts of the cases as to why the payments were not subject to withholding tax, and thenceforth to effectively dispute the impugned decision.

[43] The respondents ventilated that there were no intellectual property rights provided for by the second respondent to the first respondent. In fact, there was no acquisition of any rights under the service agreement to constitute royalty. What was provided for by the second respondent were services that a third party telecommunication provider like Telekom Malaysia Berhad would provide to facilitate the first respondent's access or connection to the global network for voice, data and video communication. The payments were merely charges for the services.

[44] The respondents submitted that the impugned decision of the appellant therefore should be quashed as it was *ultra vires* the law.

Our Analysis

[45] Under s. 3 a person is liable to income tax on income accrued in or derived from Malaysia or received in Malaysia from outside Malaysia. The amount charged on individuals and companies varies in accordance with the appropriate tax rates to chargeable income after having taken into account all the necessary allowable adjustments.

[46] For purposes of this appeal, the contested income to be taxed was alleged to have been derived from royalties, as legislated in s. 4(d) of the ITA and this section reads:

> **Classes of income on which tax is chargeable**
>
> 4. Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) … royalties ...;

[47] Section 2 states that 'royalty' includes:

> (a) any sums paid as consideration for the use of, or the right to use:
>
> (i) copyrights, artistic or scientific rights, patents, designs or models, plans secret processes or formulae , trademarks or tapes from radio or television broadcasting, motion picture films, films or video tapes or other means or reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;
>
> (ii) know-how or information concerning technical industrial, commercial or scientific knowledge, experience or skill;
>
> (b) income derived from the alienation of any property, know-how or information mentioned in para. (a) of the definition;.

[48] The promulgation of s. 4(d) of the ITA and the definition of royalty supplied in s. 2 cleared the air and subjected the importation of know-how and intellectual property from overseas to income tax; in line with globalised business dealings of which Malaysia cannot escape from. Under s. 4A(i), (ii) or (iii) of the ITA (a provision that deals with another source of taxable income ie, a special class of income), notwithstanding s. 4 but subject to the ITA, the income of a person not resident in Malaysia but derived from Malaysia is chargeable to tax.

[49] How to collect the income tax from elusive foreign companies whether from income under ss. 4(d) or 4A of the ITA was statutorily resolved by the promulgation of s. 109 and s. 109B of the ITA respectively.

[50] Section 4A of the ITA surfaced in this appeal as the judicial review application filed by the respondents made mention of them. Section 109 and s. 109B of the ITA were already mentioned much earlier in appendix 1, a document that was attached to the letter of 14 April 2008. A perusal of appendix 1 shows that s. 109 of the ITA was referred to for expenses for licences, maintenance fees, payments for training of foreign workers and the like, and s. 109B of the ITA referred to for payments of leased communication and facilities.

[51] Let us now peruse s. 109 and s. 109B of the ITA for better understanding of the matter before us. They respectively read as follows:

Deduction of tax from interest or royalty in certain cases

109. (1) Where any person (in this section referred to as the payer) is liable to pay interest or royalty derived from Malaysia to any other person not known to him to be resident in Malaysia, other than interest or royalty attributable to a business carried on by such other person in Malaysia, he shall upon paying or crediting the interest (other than interest on an approved loan or interest of the kind referred to in paragraph 33 or 35 of Part I, Schedule 6) or royalty deduct therefrom tax at the rate applicable to such interest or royalty, and (whether or not that tax is so deducted) shall within one month after paying or crediting the interest or royalty render an account and pay the amount of that tax to the Director General:

[Am. Act 328: s.11; Am.Act 497: s.7]

Provided that the Director General may:

(a) give notice in writing to the payer requiring him to deduct and pay tax at some other rates or to pay or credit the interest or royalty without deduction of tax;

or

(b) under special circumstances allow extension of time for tax deducted to be paid over.

(2) Where the payer fails to pay any amount due from him under subsection (1), that amount which he fails to pay shall be increased by an amount equal to ten percent of the interest or royalty liable to deduction of tax under subsection (1) and the total sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

[Subs. Act 557: s.18]

Deduction of tax from special classes of income in certain cases derived from Malaysia

109B. (1) Where any person (in this section referred to as "the payer") is liable to make payments to a non-resident:

(a) for services rendered by the non-resident person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such non-resident;

(b) for technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or

(c) for rent or other payments made under any agreement or arrangement for the use of any moveable property,

[Am. Act 309: s. 14; Am. Act 328: s. 12; Am. Act 557: s. 19]

which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments, and (whether or not that tax is so deducted) shall within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General:

Provided that the Director General may:

(i) give notice in writing to the payer requiring him to deduct and pay tax at some other rates or to pay or credit the payments without deduction to tax; or

(ii) under special circumstances, allow extension of time for tax deducted to be paid over.

(2) Where the payer fails to pay any amount due from him under subsection (1), the amount which he fails to pay shall be increased by an amount equal to ten per cent of the payments liable to deduction of tax under paragraph (1)(a), (b) or (c) and the total sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

[Subs. Act 557: s. 19]

[52] These are colloquially called the withholding tax provisions and there is nothing intimidating about their meaning. It merely means that the payer (in this case the first respondent) withholds the tax portion of an income of a non-resident recipient (the second respondent) and transmits it directly to the Ketua Pengarah Hasil Dalam Negeri (the appellant). Section 109 or s. 109B have been crafted in such a way that each respective provision addresses a different category of income. The duty to withhold tax on royalty income would invariably fall under s. 109 whilst the special class of income that falls under s. 4A will be catered to by the withholding provision of s. 109B. What is undeniable is that, be it s. 109 or 109B, both are withholding provisions, and as the respondents have been informed that the income comes from royalty payment, by no figment of the imagination could the respondents' tax agent have been misled by something so obvious.

[53] Any non-adherence of the statutory duty will attract certain repercussions, and for purposes of this appeal, unless payment is made to the appellant within 30 days, a 10% penalty will be added to the amount of the unpaid tax. And the failed withheld payment will be disallowed as deductible expense (ss. 39(1)(f) and (j)). And all these grave consequences were mentioned at para. 4 of the letter of 14 April 2008.

[54] To wind up this issue of withholding tax, Chin Yoong Kheong at p. 283 of *Malaysian Taxation* 2nd edn had occasion to author:

> As stated earlier, withholding tax is basically a tax collection mechanism which places the duty on the payer to withhold tax at source on behalf of the IRD, and is enacted primarily to ensure collection of the tax due on specified categories of income derived from a source in Malaysia.

[55] The respondents' argument to the above is that not only did they not know that the payment was 'royalty' payment, but that even the appellant was uncertain as to the exact applicable provision. And of course it was submitted that the withholding instruction pursuant to the decision was flawed.

[56] What comes out strikingly clear is that, despite being aware and aggrieved of the impugned decision, the respondents never filed any appeal to the Special Commissioners under s. 99 against the determination by the appellant. And this despite protesting *vide* letter dated 28 April 2008 that the first respondent was aware of its rights to appeal against the appellant's decision.

[57] Section 99(1) reads:

> A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director general within thirty days after the service of the notice of assessment or … a written notice of appeal in the prescribed form (ie, Form Q) stating the grounds of appeal and containing such other particulars as may be required by that form.

[58] To dispel any fear of a taxpayer, merely because he has to face such an awesome body in the form of the Government, Gill FJ in *Sun Man Tobacco Co. Ltd v. Government of Malaysia* [1973] 1 LNS 144; [1973] 2 MLJ 163 had occasion to state:

> The doors of justice are not shut to him merely because its claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. **It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts** (emphasis added).

[59] The respondents when asked about the failure to appeal, replied that the issue of withholding tax is not an assessment, hence the irrelevancy of s. 99 in this appeal. We will discuss the issue of 'assessment' later (see paras. 72-75).

[60] Had the respondents filed an appeal before the Special Commissioners, where the onus is on the respondents to establish their position, they will be accorded every opportunity to show where the appellant went wrong. The respondents may request for the attendance of witnesses to give evidence on oath and request any witness to produce any books, papers or documents which are in his custody or his control necessary for purposes of the appeal. Therefore, before the Special Commissioners the respondents will have all the opportunity to ventilate his disgruntlement, with every opportunity to undo what the appellant determined (see *Director-General of Inland Revenue v. Lahad Datu Timber Sdn Bhd* [1977] 1 LNS 26; [1978] 1 MLJ 203).

[61] At the completion of the hearing of the appeal, the Special Commissioners shall give their decision in the form of an order known as a deciding order, and which in certain circumstances may be final. Either party to the proceedings before the Special Commissioners may appeal on a question of law against a deciding order, or may request the Special Commissioners to state a case (generally known as case stated) for the opinion of the High Court. Any dissatisfied party may appeal only up to the Court of Appeal (*Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd* [2013] 2 CLJ 910; *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v. Kumar Gurusamy* [2011] 3 CLJ 241; *Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No. 8-31-99 (S) (Unreported)).

[62] By filing an appeal before the Special Commissioners the respondents would have had that opportunity to challenge the decision of the appellant as to whether the payments were indeed royalty. Likewise, the respondents would have had the chance to rebut s. 15A of the ITA. Section 15A provides that certain income, including the likes of services rendered by the second respondent to the first respondent, shall be deemed to be derived from Malaysia.

[63] By circumventing the Special Commissioners, from resolving these issues, and unwittingly leaving the deeming provision unrebutted, the first respondent's payments to the second respondent are thus income derived from Malaysia. That being so, the requirements of s. 4(d) read together with s. 109, and s. 4A read together with s. 109B of the ITA have been satisfied. In short, as the first respondent is liable to pay (and did pay), and the second respondent is taxable even though a non-resident, s. 109 and s. 109B respectively will be triggered and the first respondent is statutorily bound to withhold a portion of the payments as tax. By analogy, we refer to the case of *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 3 CLJ 421), a case falling under s. 4A (iii) of the ITA, where we said:

> In the circumstances of the case as the non-resident companies in this appeal are taxable, s. 109B of the Act is triggered, and the respondent is forthwith statutorily bound to withhold a portion of the payments as tax. To reiterate, this provision is a tax collection mechanism primarily to ensure collection of the tax due from any person liable to make payments to a non-resident person (or non-resident companies in the circumstances of the case …

[64] At the risk of repeating, as there was no appeal to the Special Commissioners, this court has no option but to accept certain facts and conclusions as not reversible *(fait accompli)*. We cannot alter the view that the payments made by the first respondent are royalty payments and now be heard to complain, bearing in mind that they have failed to avail themselves, to echo Gill FJ, "of that remedy as laid down by the law" before coming to the courts.

[65] The respondents instead filed a judicial review under O. 53 of the Rules of the High Court 1980 to vent their disgruntlement. On scrutinising the judicial review application, what struck us was that the appellant's decision to subject the respondents to withholding tax or increased withholding tax was the central issue to the appeal.

[66] The grounds for the judicial review are that, the appellant had erred in law and or acted in excess of powers conferred by the ITA, and or without jurisdiction and or had acted unreasonably. An argument put forth strongly by the respondents was that the appellant acted unreasonably by not supplying the reasons to them (and in consonant with the central issue stated immediately above), disagreed that withholding tax should have been imposed on the first respondent.

[67] Under O. 53 of the RHC 1980, an applicant may procedurally seek out the reliefs specified at para. 1 of the Schedule to the Courts of Judicature Act 1964, and for the purposes specified therein. Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 are the additional powers of the High Court, powers in addition to those already seised by it, to issue prerogative writs, wherein a High Court Judge may issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II (arts. 5 to 13) of the Federal Constitution, or any of them, or for any purpose.

[68] Section 25 of the Courts of Judicature Act 1964, when read together with para. 1 of the Schedule, provides the High Court of that augmented power. For purposes of the current appeal, the Director-General of the Inland Revenue will fall under the reference of "any person or authority". Under this source of power, the High Court may grant relief in a judicial review whilst O. 53 of the RHC 1980 prescribes the procedure and practice when filing for that judicial review.

[69] A judicial review is a court proceeding where a challenge is made on the decision of the relevant authority or entity (in this case the appellant) ie, by challenging the lawfulness of the decision-making process. This is trite law. Generally, the court dealing with the judicial review application in a supervisory capacity is not to delve into the merits of the case. In other words, the evidence is not reassessed. The court is merely to quash the decision of the relevant authority, if need be, and not to substitute with what it thinks is the correct decision. We are not here to usurp the powers of the designated authority.

[70] Lord Brightman in *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155, at p. 1174 had occasion to state that a judicial review "is not an appeal from the decision but a review of the manner in which a decision is made". The book authored by Mr Michael Supperstone QC and Mr James Goudie QC in *Judicial Review* at p. 72, was also referred to, and reads:

> It is easy to understand why this is so. The paradigm case of a Judicial Review challenge arises where a body whose functions are conferred by statute are said to have acted in a manner in which the law does not allow. But if the only complaint is that the body has reached a decision unfavourable to the applicant on the facts, and the claim put forward is a plea to the court in effect to substitute a different decision, the proceedings would amount to an invitation to the court to exercise the very function which statute had confided to the body reviewed; to accede to such an invitation would be to usurp the will of Parliament. Since, of course, Parliament includes the elected element of the legislature, any such stance by the court might reasonably be castigated as undemocratic …

[71] However, the Federal Court in the landmark decision of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 held that the decision of an inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality", which not only permits the courts to scrutinise the decision-making process but also the decision itself. In short, it allows the courts to delve into the merits of the matter.

[72] The approach of illegality and irrationality was recognised and applied by *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145. This court in succinct terms said:

> On the facts of this case, we find MTUC had failed to show that the Minister's decision was illegal, irrational and flawed on the grounds of procedural impropriety.

[73] It is now clear, and here to stay, that the decision of an inferior tribunal may also be reviewed on the grounds of illegality and irrationality. The distinction between a review application and an appeal thus appears to no longer exist (see also *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629).

[74] Despite the introduction of the grounds of "illegality", "irrationality" and possibly "proportionality", and the liberal approach, *R Rama Chandran* self-checked itself when it stated at pp. 183-184 (CLJ); p. 197 (MLJ) that:

> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.
>
> For example, where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underline such decisions, courts ought not to review the reasoning of the administrative body, with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of power on the part of the courts.

[75] *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625, in no uncertain terms said that the reviewing court may scrutinise a decision on its merits but only in the most appropriate case. At p. 635 we said:

> Clearly therefore, not every case is amenable to the *Rama Chandran* approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge …

[76] The respondents have set out the grounds in brief in their application for judicial review founded on error of law or acting in excess of powers conferred by the ITA and/or without jurisdiction. These three grounds would fall squarely on the term of "illegality" as propounded by *R Rama Chandran*.

[77] Let us now peruse the facts and decide whether the respondents did manage to establish those grounds in support of their application.

[78] The evidence shows that the appellant had sent the letter of 28 March 2008 demanding payment of the tax. The first respondent promptly made payment under protest. We enquired why the withholding tax payments should not have been appealed against under s. 99. In response, the respondents replied that a withholding tax does not fall under the definition of assessment, and as it falls outside the ambit of s. 99, their remaining choice was a judicial review application.

[79] A view held by Wan Hamzah J in *Government of Malaysia v. P Corporation (M) Sdn Bhd* (1950-1985) MSTC 426, and of which we approve, had occasion to opine that s. 99 refers to 'assessment' generally and not specifically to 'assessment to tax'. It is established law that papers or notices of assessments sent out by the appellants to taxpayers are not

assessments. An assessment is the official administrative act of the appellant who determines the amount of tax to be paid by a taxpayer, after having taken into account all the relevant circumstances. Notices of assessments will be sent out only after the ascertainment is complete. In *The King v. The Deputy Federal Commissioner of Taxation for South Australia; ex parte Hooper* [1926] 37 CLR 368/373 Isaacs J said:

> An assessment is not a piece of paper; it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called 'a notice of assessment' … But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act or operation of the Commissioner.

[80] The above view was cited with approval by Buttrose J in *A.B.C v. The Comptroller of Income Tax, Singapore* [1959] 1 LNS 1; [1959] 1 MLJ 162/165 when he said:

> The assessment itself is the administrative act of the Comptroller and determines the quantum of the tax …

[81] The relevant question that must follow is, did the appellant make an assessment ie, carry out an official administrative act, when he ordered the first respondent to make payments of the withholding tax? Without a doubt the answer is in the affirmative. That being so, with the imposition of the withholding tax being an assessment, it is thus subject to appeal to the Special Commissioners under s. 99.

[82] Let us scrutinise the grounds of judgment of the High Court in order to appreciate the reasoning of the successful judicial review application at the High Court. Perusing the grounds of judgment of the High Court, out of 21 pages of the grounds of judgment, the High Court reserved 18 pages to regurgitate the submissions of the contending parties, and merely left three pages to give her reasons why the judicial review application was allowed.

[83] On further perusal of pp. 8, 10, 12 (paras 18 and 19), 13 (para 21), 15 (para 12), 14 and 24 we are painfully aware that the discussions carried out by the High Court centred on the merits of the case.

[84] The learned judge criticised the reliance of the appellant on art. 2 of the unsigned draft agreement (AP-2). Again at p. 20 of her grounds of judgment the learned judge delved into the merits of the matter, matters that ought to be resolved by the Special Commissioners.

[85] Without giving an in-depth reasoning, the High Court again delved into the merits of the case, and concluded that it was unreasonable for the appellant to advert to ss. 109 and 109B of the ITA to arrive at the decision that the payments made were royalty payments. In no uncertain terms the learned judge opined:

> In my opinion there was failure on the part of the respondent (ie, the appellant) to give due consideration to relevant matters at the material time when making the decision that the payment were royalties and subject to withholding tax.

[86] The Court of Appeal fared no better, when it delved into the evidence (and consciously agreed with the factual finding of the High Court Judge).

[87] The Court of Appeal criticised the appellant for not providing reasons for its decision to the respondents, and opined that by such failure to be open, the court could conclude that the appellant had no good reasons in making the impugned decision. This strong view came about after the Court of Appeal had referred to the decision of *Pahang South Union Omnibus Co. Bhd v. The Minister of Labour & Manpower & Anor* [1981] CLJ 83; [1981] CLJ (Rep) 74; [1981] 2 MLJ 199 which endorsed Lord Denning MR's remarks in *General Electric Co Ltd v. Price Commission* [1975] ICR 1. Lord Denning MR opined:

> If the decision making body comes to its decision on no evidence or comes to an unreasonable finding-so unreasonable that a reasonable person would not come to it-then again the courts will interfere … If it gives no reasons-in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion and act accordingly.

[88] Having perused the above remarks it is obvious that if the circumstances warrant it, and after having considered all the relevant factors, judicial interference is permissible. Putting aside the obvious that Malaysia suffers different challenges due to its complex populace, enforcing a blanket view that silence by a decision-maker implies lack of good reasons may be too strong a stance, and must be treated with considerable reserve.

[89] For purposes of this appeal, the cases of *Stefan v. General Medical Council* [1999] 1 WLR 1293 and *A.B.C v. The Comptroller of Income Tax, Singapore (supra)* are of great help. Lord Clude in *Stefan v. General Medical Council* had occasion to state:

> "The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current developments towards an increased openness in matters of government and administration." **But the trend is proceeding on a case by case basis** … and has not lost sight of the established position of the common law that **there is no general duty, universally imposed on all decision-makers** (emphasis added).

[90] In *A.B.C v. The Comptroller of Income Tax, Singapore (supra)*, the Comptroller caused to be served on the taxpayer notices of assessment or additional assessments in respect of certain years. The taxpayer returned all the notices of assessment and demanded the Comptroller to furnish him with reasons for or detailed basis on which the Comptroller made the assessments. As in the current appeal, correspondences passed between the Comptroller

and the taxpayer and the Comptroller eventually gave notice to the taxpayer that he did not propose to amend the assessments or additional assessments. An appeal was lodged by the taxpayer, and to cut the story short, the matter ended up as a case stated at the High Court. This did not happen here in the current appeal before us. The main issue in contention, and of relevance to us was that, the notices of assessment did not indicate the source of income that led to the liability of tax. So, must the Comptroller as a decision-maker specify or give particulars of the source of the taxpayer's income before a tax liability is disclosed? After all, an assessment had been made. After delving into a string of authorities, and applying them to the facts in that case, Buttrose J opined that the taxpayer was not entitled to the particulars of the source or sources from which the Comptroller alleged that the taxpayer derived the amounts in question set out in the assessment notices. The court held that the notices of assessments were valid. Buttrose J remarked:

> It is no doubt a truism to say that you cannot have income without a source but on the construction of the Ordinance as a whole I am unable to find anything that requires the Comptroller or imposes upon him a duty to specify or give particulars of the sources of the taxpayer's income before a legal liability to tax is disclosed …

[91] Guided by those persuasive cases, judicial interference therefore should be on a case by case basis. As regards this appeal, we also find no statutory provision that demands the appellant to supply reasons why the first respondent is duty bound to pay the withholding tax. Apart from the want of a statutory provision demanding the supplying of reasons, in the circumstances of the case, with there being more than ample documents or reasons surfacing in the course of the negotiations which are self-explanatory, the need to give an overt explanation is superfluous.

[92] The Court of Appeal here, en route to its decision merely reproduced and discussed a plethora of cases on the trite law or issues regarding the law of judicial review, rather than highlighting where the appellant went wrong prior to making its decision.

[93] To avoid falling into the same trap of the subordinate courts, after sifting through the available material regarding the decision-making process, we find that the appellant had:

(a) negotiated with the respondents;

(b) exchanged correspondences with the respondents. The first was the letter of 31 October 2007;

(c) there was even a finding of facts (see para 4 of the COA grounds of judgment) that several meetings and exchanges of correspondences took place between the appellant and the respondents;

(d) the sum was then reduced to RM1,781,274;

(e) a further representation was made by the first respondent and the withholding tax was reduced to RM1,507,674.80 as per the appellant's letter dated 28 March 2008;

(f) then came the impugned letter of 14 April 2008 in which appendix 1 was appended detailing out the amount to be paid and making reference to the relevant provisions;

(g) the respondents protested *vide* letter dated 28 April 2008; and

(h) the appellant warning the respondents of the repercussion of non-payment in both the letters of 28 March 2008 and 14 April 2008.

[94] It cannot be denied that ss. 109 and 109B of the ITA were referred to by the appellant in appendix 1 of the letter dated 14 April 2008, and even in its earlier letter, as far back as 31 October 2007. The earliest produced letter of the respondents, dated 14 November 2007 even made mention of the above two provisions. By no account the respondents' accountants, PricewaterhouseCoopers Taxation Services Sdn Bhd, a company that is world renowned for its tax expertise could have failed to know what these two sections referred to. These provisions, as briefly discussed above, are self-explanatory.

[95] The matter before us should be focused on whether any defect is detectable in the decision-making process ie, before the appellant arrives at its decision, and whether the decision falls within the *R Rama Chandran* approach. Having perused the evidence adduced before us, we are satisfied that apart from there being no flaw detectable in the decision-making process there was also no illegality or irrationality in the decision. That being so the appellant's decision must stand. The respondents therefore, are liable to the withholding tax.

[96] We have an additional reason why the appeal must be allowed. A rather disquieting factor which we detect is that, even though the respondents are not prevented from seeking remedy under O. 53 of the RHC 1980, the respondents have failed to satisfy some of the statutory requirements.

[97] Under O. 53 r. 3(6) of the RHC 1980, an application shall be made promptly, or within 40 days when grounds for the application first arose, or when the decision was first communicated. If an applicant is out of time he then must apply for an extension of time. If none is made or no extension of time is granted the judicial review application therefore becomes incompetent.

[98] On the issue of timeliness the first flaw detected is the issue of when the decision was made by the appellant. From the chronology of events we noted that the letter dated 28 March 2008 addressed to the first respondent had already decided as to the amount to be paid by the latter. Paragraph 2 reads:

Adalah dimaklumkan bahawa, setelah meneliti secara terperinci rayuan yang dikemukakan oleh pihak tuan, pihak kami mendapati isu-isu ketidakpatuhan cukai pegangan bagi tahun tahun taksiran tersebut seperti berikut:

Rujukan	Amaun (RM)
Lampiran 1	1,507,674.80

3. Oleh itu tuan diminta hadirkan diri…dan seterusnya mengatur bayaran. Sila kemukakan salinan resit bayaran jika cukai pegangan telah dibayar.

4. ...

[99] The decision was clear. As abovementioned, the final sum directed to be paid was RM1,507,674.80. In other words, the decision already was in the letter of 28 March 2008, and addressed to the first respondent.

[100] The contents of the letter dated 14 April 2008 therefore was to clarify (and in fact in response to) the respondents' tax agent's query as per letter dated 14 April 2008 (same date). If not for the attachment of appendix 1, this letter, which is addressed to the tax agent rather than the first respondent, would have been a replica of 28 March 2008 letter.

[101] The judicial review application was filed on 23 May 2008. By alluding to the letter of 14 April 2008, to indicate when the decision was made, the application indeed was made in the nick of time ie, by one day. Going by the letter of 28 March 2008 the respondents were way out of time. And no application to extend time was ever filed.

[102] On a finding of fact, as the decision was actually made in the earlier letter of 28 March 2008 rather than the clarification letter of 14 April 2008, then, not only was the premise of the judicial review application flawed but was also out of time. The judicial review application thus should not have been entertained in the first place. In short, the judicial review application is incompetent.

Conclusion

[103] The additional ground of the incompetency of the judicial review application aside, we find that the respondents had failed to establish the grounds supplied in the judicial review application. We also find that the appellant had not erred in law in its performance of duty when arriving at its impugned decision.

[104] We therefore allow the appellant's appeal with costs.

[105] Question (a) is to be answered in the negative. We refrain from answering question (b).

[106] Costs of RM30,000 subject to allocatur.

Zainun Ali FCJ (Supporting):

[107] The respondents filed an application for judicial review for an order of *certiorari* to quash the appellant's decision contained in a letter dated 14 April 2008 addressed to the first respondent's tax agent. Based on the said letter, the first respondent was required to pay withholding tax for the years of assessment 2001-2005 in the sum of RM1,507,674.80. The appellant in the abovementioned letter referred to ss. 109 and 109B of the Income Tax Act 1967 (the Act) as the legal provisions subjecting the payments to withholding tax.

[108] The basis for the respondents' application for judicial review for an order of *certiorari* to set aside the decision contained in the said letter was two-fold:

(i) That the appellant was uncertain as to the exact application of the relevant provision and so the appellant was unreasonable in applying both ss. 109 and 109B; and

(ii) The appellant failed to give reasons for the decision.

[109] The respondents averred that the appellant had committed an error of law in the manner it took in exercising its administrative function under the Act.

[110] The Court of Appeal dismissed the appellant's appeal on the ground that the appellant had acted unreasonably by invoking both ss. 109 and 109B of the Act in deciding that the payments were royalties within the meaning of s. 2 of the same. Question no. 1 in this appeal stemmed from the above decision of the court.

[111] On the issue of failure to provide reasons, the Court of Appeal was of the view that s. 140(5) of the Act does not apply to the facts of this case. However, after making this finding, the court did not make any determination as to whether the facts and circumstances of the case disclosed that the appellant had given reasons for its decision.

[112] Instead, the court referred to a statement of law that in the absence of reasons being given by an administrative body the courts are at liberty to conclude that it has no good reason in making its decision. We are in agreement with our learned brother Suriyadi FCJ, that such statement of law must be applied cautiously.

[113] The correct application of the law concerning the duty of administrative authorities to give reasons for decisions has been explained by the Privy Council in *Dr Stefan v. The General Medical Council* [1999] 1 WLR 1293. It must be emphasised that the law does not impose a general duty upon decision-makers to give reasoned decisions. The trend of the law is

towards giving reasons, but on a case by case basis. Among the determining factors when reasons ought to be given by administrative decision-makers lie in the nature and character of the decision making and when the giving of reasons will be required as a matter of fairness and openness.

[114] The above principles enunciated by the Privy Council in *Dr Stefan* has also been endorsed by this court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 and *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105; [2002] 3 MLJ 72.

[115] Reverting to the appeal before this court, the appellant was granted leave to appeal on two questions namely:

(i) Whether the letter of the Director General of Inland Revenue dated 14 April 2008 referring to both ss. 109 and/or 109B of the Income Tax Act 1967 is bad in law?

(ii) If the answer (for Question 1) is in the negative, are the payments for the services as referred in the agreement exhibited as "PC3" royalties under s. 109 of the Income Tax Act 1967.

[116] Learned counsel for the respondents submitted that the respondents' complaint stemmed from the defective notice of assessment. It was averred that if the appellant was uncertain and unclear as to which legal provision is applicable in order to withhold the tax, it would fundamentally be unreasonable to require taxpayers to withhold the taxable portion. The assessment could not have been made based on two statutory provisions of the law resulting in it being void for ambiguity.

[117] The Court of Appeal took the position that the appellant had acted unreasonably by invoking both ss. 109 and 109B of the Act in deciding that the payments were royalties within the meaning of s. 2 of the Act. The Court of Appeal was of the view that the appellant in holding that the payments were royalties and chargeable as withholding tax under s. 109 of the Act made an implied admission that the payment was not chargeable under s. 109B of the Act. Therefore, the appellant had not only acted unreasonably in the circumstances of the case but had also committed an error of law, exceeding his statutory power in relying on both the said sections of the Act.

[118] At the outset, it must be highlighted that the administrative decision contained in the letter of 14 April 2008 concerned assessment of withholding tax. The abovementioned letter was, in fact, a notice of assessment issued by the appellant. The crux of the appeal is whether the appellant's administrative decision contained in the letter dated 14 April 2008 is void when it relied on two provisions of law?

[119] It is our view that the applicable test governing issues of validity of an assessment or a notice of assessment is to be found in s. 143 of the Act; which reads as follows:

> **143. Errors and defects in assessments, notices and other documents**
>
> (1) **No assessment, notice or other document** purporting to be made or issued for the purposes of this Act shall be quashed or deemed to be void or voidable for want of form, or be affected by any mistake, defect or omission therein, if it is in **substance and effect** in conformity with this Act or in accordance with the intent and meaning of this Act and:
>
> (a) in the case of an assessment, the person assessed or intended to be assessed or affected thereby is designated according to common intent and understanding; and
>
> (b) in any other case, the person to whom it is addressed and any other person referred to therein are so designated.
>
> (2) An assessment purporting to be made or issued for the purposes of this Act shall not be impeached or affected by reason of a mistake therein as to:
>
> (a) the name of a person charged to tax;
>
> (b) the **description of any income**; or
>
> (c) the amount of chargeable income assessed or tax charged,
>
> and a notice of assessment purporting to be so made or issued shall not be impeached or affected by any such mistake if it is served on the person in respect of whom the assessment was made or intended to be made (or served in accordance with subsection 67(5)) and contains in substance and effect the particulars contained in the assessment.
>
> (3) Notwithstanding subsection (2), if the amount of tax charged by an assessment has been incorrectly calculated by reference to the amount of the chargeable income and the appropriate rate of tax applicable thereto, the amount of tax charged as shown in the assessment and the notice of assessment may, if the Director General so directs, be taken to be the amount of tax which ought to have been charged if it had been correctly calculated.
>
> (4) A notice of tax payable purporting to be issued for the purposes of this Act shall not be impeached by reason of a mistake therein as to the name of the person liable to pay the tax if the notice is served on that person.
>
> (emphasis added)

[120] Referring to s. 143 of the Act, any error or mistake committed by the appellant in the exercise of its administrative function under the Act does not render an assessment void or voidable unless there is error in substance and is against the provisions of the Act. It must be emphasised however, that defect in procedure cannot displace the underlying liability for tax imposed by the statute.

[121] A perusal of appendix 1, which was attached to the letter of 14 April 2008 shows that ss. 109 and 109B were referred to for payments of Leased Communication and Facilities.

[122] The two sections apply to different types of income. The duty to withhold tax on royalty income falls under s. 109. The special class of income under s. 4A is dealt with in s. 109B. It could be observed that the error committed by the appellant lies in the **description of income** which was subject to withholding tax. (emphasis added)

[123] Applying s. 143(2)(b) of the Act, the assessment contained in the letter dated 14 April 2008 shall not be impeached or affected merely by reason of a mistake therein as to "the description of any income".

[124] In the instant appeal, the appellant was found to be uncertain and unclear in its decision-making when it listed down s. 109 and s. 109B without more, in the said letter. The question then arises: Whether the substance and effect of the assessment and notice issued by the appellant could have been affected by such uncertainty and therefore bad in law? After perusing the letter and provisions of the Act in its entirety, we find that this is not the case since both ss. 109 and 109B are the withholding tax provisions under the Act. An erroneous statement of the law as such, would not bar the appellant from claiming the withholding tax, as provided for in the Act.

[125] It is pertinent to note that the Revenue does not by assessment impose on the taxpayers the liability to tax but that that liability is directly imposed by the statute itself. The following statement made by MacCarthy J in *Reckitt & Colman (New Zealand) Ltd v. Taxation Board of Review* [1996] NZLR 1032 is persuasive. It states that:

> Liability for tax is imposed by the charging sections … The Commissioner acts in the quantification of the amount due, but it is the Act itself which imposes, independently, the obligation to pay. The assessment and objection procedures are merely machinery for quantifying: they do not cast liability.

[126] Applying s. 143(1) of the Act, even if the appellant was uncertain as to the exact applicable provision, it does not render the assessment void for want of form. To put it in a nutshell, the allegation of procedural impropriety ought not to be permitted to vitiate the appellant's statutory duty to assess and collect the correct amount of tax.

[127] A party who is dissatisfied with an assessment or administrative decision issued by the Revenue under ss. 109 or 109B is not left without any remedy. In the circumstance of this case, if it is dissatisfied with the assessment or notice of assessment issued by the appellant, the first respondent ought to have exercised its right to appeal under s. 99 of the Act. Before the Special Commissioners, the first respondent would have an opportunity to make known its dissatisfaction. It will have the opportunity to tender exhibits, and give evidence if necessary.

A **[128]** Thus the first question is answered in the negative. The letter of the Director General of Inland Revenue dated 14 April 2008 referring to both ss. 109 and/or 109B of the Income Tax Act 1967 holds good and is therefore not bad in law.

B **[129]** Referring to question no. 2, since the respondents failed to file an appeal to the Special Commissioners under s. 99 of the Act, the court should not delve into the merits of the matter which in any case ought to be resolved by the Special Commissioners. On this, we agree with the view expressed by our learned brother Suriyadi FCJ at paras. 56-64 of his judgment. Thus question 2 need not be answered.

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